

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1362 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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MIRZA KARARBEG NASIRBEG .....Ahmedabad

Versus

MOLVI MUKHTYARKHAN BUKHARI RAHIMKHAN AND 3 OTHERS  
AHMEDABAD

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Appearance:

MS VASUBEN P SHAH with MR AMAR N BHATT  
for Appellant  
MR AJ MEMON for Respondent

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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 18/03/97

ORAL JUDGEMENT

Being aggrieved by the judgment and decree dt.  
18th June, 1979, passed by the then learned Judge of the  
City Civil Court at Ahmedabad, in Civil Suit No. 3250 of  
1975 dismissing the suit with costs, the original  
plaintiff has preferred this appeal.

2. In the city of Ahmedabad on Dudheswar Road in Shahi Masjid Compound, there is an open land bearing Municipal Census No. 359/5/2. It was owned and under the management of Peerkhwaja Nasiruddin Chisti trust. The appellant in July 1962 A.D. took that land on lease for the purpose of constructing his residential house. The land was admeasuring 50 ft x 18 ft. The rent of that land was fixed at Rs.15/- per month. He constructed residential block thereon. Thereafter in 1963, he again hired the land in front of his house admeasuring 30' x 18' and the rent of the whole of the land came to be fixed at Rs.25/- per month. The appellant constructed his house consisting of 4 rooms, of them one room ('the suit room' for shot) admeasuring 14' x 18' towards the west was permitted to be used and occupied by the respondent no.1 on leave and licence basis. The respondent no.1 is the Maulvi, and therefore, the appellant was respecting him. Because of reverence and high regards for the respondent no.1, the appellant no.1 permitted him to use and occupy the suit room without any charge. Initially the respondent no.1 was residing in another hut in the same compound, but as his daughter committed the suicide, he lost propensity for the hut. He decided to shift therefrom. He was then inducted on leave & licence base free of charge. Since then he has been residing in the suit room as licensee. The appellant was in need of the suit room, He in 1965 gave notice, revoked the licence and called upon the respondent no.1 to hand over vacant and peaceful possession of the suit room. The respondent no.1 requested him to continue him in the suit room. The appellant then owing to reverence he was having, permitted the respondent no.1 to continue to occupy the suit room as licensee. By passage of time, the appellant, because of growing requirements, was in need of the room. He, therefore, on 30th May 1972 by a registered post sent a notice and revoked the licence. After being served with the notice, the respondent no.1 did not hand over vacant possession of the suit room. The appellant, therefore, preferred P.S.R.P. No.19 of 1972 before the Small Causes Court at Ahmedabad under Sec.41 of the Presidency Small Causes Courts Act. On 6th August, 1975, the Small Cause Court passed the order and rejected the application with costs. Thereafter he filed the suit for the recovery of the possession of the suit room, mesne profits at the rate of Rs.20/- per month, and for a declaration that the order, passed by the Small Cause Court on 6th August, 1975 holding that the respondent no.1 was not the licensee, is not binding to him etc. The respondents nos. 2 to 4 are the sons of respondent no.1 and reside with him. The respondents appeared and filed their written statement denying every

allegation levelled against them and further submitted that in fact, the appellant was not the owner of the suit room. The respondent no.1 was residing in the compound right from 1952. He had hired the land from the trust called " Peerkhwaja Nasiruddin Chisti " and the rent thereof was fixed at Rs. 5/- per month inclusive of the taxes. After hiring the land, he constructed the suit room thereon. Thereafter in 1962, the appellant hired the land nearby and constructed his residential premises touching the suit room. The appellant was collecting rent for and on behalf of the trust. The trust & the appellant had joining hands filed the suit. The suit was hit by the principles of res-judicata and estoppel etc. Thus the respondents denying the ownership of the appellants claimed their ownership over the suit room. The learned Judge below, hearing the parties, dismissed the suit. He held that respondent no.1 was the owner of the suit room and not the licensee. Against such judgment and decree passed, the present appeal is preferred before this court.

4. It may be stated that no one appeared on behalf of the respondents to submit, though waited for two days. With meticulous care and finicky details therefore I have perused the evidence on record and considered the submissions made by Mr. Amar N. Bhatt, the learned Advocate representing the appellant. According to Mr. Bhatt, ignoring material aspects and misconstruing the evidence, the learned Judge, erroneously held that the suit room belonged to the respondent no.1 and not the appellant, although there was ample evidence on record establishing the ownership of the appellant. Keeping material evidence aside and on the basis of the impression, came to be engrafted in his mind at the time of local inspection, the learned Judge held against the appellant.

5. A perusal of the judgment of the lower court reveals that the learned Judge held that the bills, vouchers, receipts of the goods purchased or labour charges paid for the purpose of constructing the house, were no doubt showing that appellant constructed the house bearing Census No. 359/5/2; but certainly not about the suit room. He further held that there was no other documentary evidence on record going to show that the suit room was constructed by the present appellant. The parties did not get the map prepared & Panchnama drawn getting the Commissioner appointed. Hence it seems the learned Judge had made a local inspection. At that time, he found that length and width of the suit room and

the rest of the portion of the house in possession of the appellant were not identical. The learned Judge, also found that western and northern sides of the suit room were in dilapidated condition, while appearance of the rest of the premises was different and dissimilar giving impression that the suit room was not the part and parcel of the building constructed by the appellant. It may be stated that there are in all four rooms from west to east in one line alike train-coaches. From west first room is occupied by the respondents and 2nd is occupied by Latif; while rest of the two rooms towards east are in possession of the appellant. Latif occupying the 2nd room owned by the appellant is not examined. The roof of the suit room is at the height of 7' to 8', while the roof over rest of the residential premises in occupation of the appellant was at the height of 15'. Because of such difference in height & above facts, the learned Judge found that not the appellant but the respondent no.1 had constructed the room in question. Further no one is examined associated with the trust along with necessary record. The learned Judge, therefore, on the basis of the impression he gathered at the time of local inspection, reached the conclusion that the suit room was constructed and owned by respondent and neither constructed nor owned by the appellant. He, therefore, held that the suit room was not the part of the residential house constructed by the appellant. Consequently, he further held that the case about licence was not established. In the result, without giving findings on rest of the issues, he dismissed the suit with costs which is assailed by the appellant.

6. It may be recollected that the appellant filed the suit to recover the possession of the suit room alleging that the respondent no.1 is using and occupying the same as the licensee. It is pertinent to note that no writing about licence has been produced as the same was not at all made while permitting the respondent no.1 to make use of the suit room, and therefore, the parties have led the evidence about the ownership of the suit room in view of the rival contention they have taken before the court. Both claim ownership over the suit room. The appellant alleges that after hiring the land from the trust, he constructed the residential premises consisting of four rooms, one of those rooms is the suit room. The western side room i.e. the suit room was then given to the respondent no.1 for use and occupation as licensee. Challenging such case, the respondent no.1 contends that he is the owner of that suit room, because he took the land on lease from the trust and constructed the room thereon. Thus both claim ownership over the

same.

7. Perusing the evidence on record, I find that the case advanced by the appellant cannot be thrown over Board. It may be stated that there is no document establishing the ownership of the appellant over the suit room. Likewise the respondents have no document of title. When that is the case, the court has to consider other facts and circumstances on record and conclude what logically flows therefrom.

8. The appellant has produced certain receipts from Exs Nos. 40 to 45, 47 & 48. Those receipts show that the appellant has purchased timber, iron sheets, and corrugated sheets and had also paid labour charges. He had also entered into an agreement with one Mistry which is produced at Ex.46. Placing reliance on such receipts, the learned Judge has held that the appellant constructed 3 rooms; but not the suit room. Of course, these receipts alone cannot conclusively establish the title, but same can be considered along with other materials on record. The appellant has also produced Municipal Card at Ex. 65, intimation received from the Municipal Corporation at Ex.66 qua valuation, and notice Ex.67 issued by the Municipal Corporation for its first valuation but these three receipts also cannot be made the base for holding that the same support the case of the ownership alleged by the appellant for the simple reason that the entries in the Municipal records are made after fiscal inquiries and any of such entries neither establishes title, nor negatives the same. The other circumstances on record should be looked at for proper appreciation and just adjudication.

9. Mohmad Zaheer Mohmad Basir who is known to the parties is examined at Ex.79. He made a statement on oath that the respondent no.1 was residing in the suit room belonging to the appellant. The said statement is not assailed by respondents while cross-examining that witness. When in the cross-examination that statement is not assailed and the statement made is found reliable, the same has to be accepted and logical conclusion flowing therefrom can be drawn. It is held by the High Court of Calcutta, in the case of Babulla Choukhani Versus Caltex (I) Limited, AIR 1967 Calcutta, 205 that if the party does not put a question to the opponent or his witness, that failure raises presumption that his statement being unassailed is accepted. In this case when the statement about ownership made by the witness is not challenged, it should be presumed that the respondent accepted that statement about the ownership. But apart

from that, outrivalling circumstances cannot be lost the sight of. The appellant in oath made it clear that there are interconnecting doors in the walls of the four rooms so that he can conveniently make use of his premises. This statement is not denied by the respondent no.1, on the contrary, the respondent no.1 in his evidence at Ex.81 has supported making a statement that there is a connecting door and that door is locked from the room occupied by Latif. The 2nd room from the west is the room given to Latif for use & occupation. It appears that while letting the room to Latif, the door in the wall between the suit room and 2nd room let to Latif, was locked from Latif's side. It is not the case of the respondent no.1 that he constructed the room having two doors one on the northern side and another on the eastern side which touches Latif's room. Even if that was so, he would not have permitted the appellant to construct touching to his western wall and close the door from Latif's side i.e. appellant's side. Viewing from another angle, it may be mentioned that if, at all, respondent no.1 was the owner of the suit room and as per his case, the appellant constructed his house subsequently, certainly one would not permit to open the door creating an access through his room and impair his privacy. The fact about inter-connecting doors (not denied but accepted), is the strongest circumstance on record going to establish the ownership of the appellant, and discrediting the truth of respondents' case.

10. The appellant has also made it clear in Para 13 of his evidence that all the four rooms he constructed are having identical windows and ventilations and that statement is also not assailed by the other side while cross examining the appellant. The statement made by the appellant can, therefore, be said to have been accepted by the otherside. The fact of the four rooms having identical windows and ventilations is also another strongest circumstance on record going to establish the ownership of the appellant over the suit room & negating the respondents' case.

11. It can be said that there is no dispute about the fact that the residential house constructed by the appellant consists of four rooms because the respondent no.1 has also in his evidence admitted that fact. His admission not only supports the case of the ownership advanced by the appellant, but damages his case about his ownership over the suit room. If at all he had constructed the suit room, certainly he would have challenged that fact mentioning that the house of the appellant was consisting of three rooms and not four

rooms. No doubt Nazir Ahmad Amirbux examined at Ex.86 has made some improvement stating that the premises constructed by the appellant were consisting of five to six rooms which is not the case of either of the parties. It seems, with a view to circumvent and escape of the entrapping situation that arose owing to aforesaid admission, a lame attempt has been made at the time of examination of Nazir Ahmad Amirbux so as to trickily make suitable improvements in the case, and that wriggling attempt itself is sufficient to show that the case advanced by the respondents about their ownership is untrue.

12. After residential premises were constructed, the application for giving census number was given to the Municipal Corporation of Ahmedabad. Accepting the application of the appellant, the Municipal Census number was given and it is 359/5/2 covering all the four rooms. No such separate census number is given to the suit room and that also negatives the case of ownership advanced by the respondents. As alleged respondent no.1 constructed his house in 1952. Since then not only the attempt is made to get census number; but objection against the census number given to the whole of the building inclusive of the suit room in favour of the appellant, is also not raised. Such inaction on the part of respondent no.1 also suggests that the case he has advanced, is of no substance.

13. One more circumstance appearing from the evidence of the respondent no.1 ( Ex.81) has to be kept in mind. According to the respondent no.1, while constructing the suit room, mainly pipes and chassis are used for the purpose of fixing roof overhead, but even above the roof, certain pipes and chassis are erected, protruding over the roof of the appellant's room now occupied by Latif. The respondent no.1 knowing about fixture of the pipes and chassis over his roof made for further extension covering even the space over roof of the room used and occupied by Latif, took no action and permitted to have the fixture over the suit room. He thus permitted the creation of encumbrance on his room restricting his right, title and interest which no one would. The respondent no.1 has not explained why he permitted to have such structure over his roof. Such circumstance discredits the truth of his case and supports the case of the appellant.

14. It is the case of the respondent no.1 that in 1952, he hired the land from the trust and constructed the suit room, but he has not produced any document

establishing his ownership. He has also not produced any document going to show that he purchased building materials from different traders and constructed the house. Even no one from the trust is also examined supporting his ownership. Neither of the neighbours is also examined to show that he constructed the room and he is the owner. No doubt, he has examined Nazir Ahmad Amirbux, but as observed above he is made the instrument of improvement in the case. As he has become the hireling, his evidence is not worthy of credence, and therefore, whatever Nazir Ahmad Amirbux stated cannot be accepted. The appellant no.1 has also in his evidence as stated above admitted that the appellant constructed the house consisting of four rooms and that supports the case of the ownership advanced by the appellant.

15. The respondent no.1 has made it clear in his evidence that he is not the tenant of the suit room and so also the tenant of the appellant. He is the owner of the suit room. The question to pay the rent of the suit room to the appellant, therefore, would not arise. He may be stated that in 1962 appellant constructed his house. The respondent no.1 has further made clear that after 1962, the rent is collected by the Trust itself through its' employee. He never received any intimation or instruction from the trust-management to pay rent of the land on which suit room is constructed to the appellant. Despite such facts what is pertinent to note is that after 2nd notice dt. 30/5/1972 from the appellant revoking the licence, the respondent no.1 remitted the sum of rent by Money Order which was not accepted by the appellant, as he was not accepting respondent no.1 as his tenant. In view of such conduct what can be deduced is that respondent no.1 accepts the fact that he is not the owner of the superstructure of the suit room; and to avoid the consequences of revocation of licence, he shrewdly remitted the sum describing the same to be

the rental and made a lame attempt to be the tenant of the suit room, despite his clear admission that he is not the tenant of the suit room.

16. The cumulative effect of aforesaid circumstances is that the appellant constructed the suit room and he is the owner of the suit room and not the respondent no.1. All these circumstances are no doubt dealt with by the learned Judge, but according to him, these circumstances were having no value in view of the local inspection he made, what he saw there and his above stated reasons, which is erroneous because the above circumstances

certainly outvie the circumstances relied upon by him. When virtually local inspection has become the decisive factor for the learned Judge, it is necessary to know what in law the purpose of local inspection is ? and what role it can play in appreciating the evidence and adjudicating the rival cases.

17. Mr. Bhatt, the learned advocate representing the appellant rightly submitted that the court cannot base his conclusion simply on the basis of the local inspection. No doubt it is open to the court to have local inspection under Order 18 Rule 18 Civil Procedure Code, if at all the necessity thereof arises, but whenever court inspects the property or makes local inspection, it is incumbent upon court, as soon as may be practicable to make a memorandum of any relevant facts observed during such inspection and such memorandum shall form part of the record. If the memorandum is not prepared and the Judge proceeds to decide the suit or gives finding on the issue, it would be unjust and against the mandate of law. The rule does not entitle a Judge to substitute his own view formed as a result of local inspection for the evidence in the case. The purpose of local inspection to enable the court to appreciate the evidence that the parties may have adduced and test its accuracy. However if the court solely relies on the local inspection, it amounts to disregarding the evidence adduced by the parties which is not at all permitted under the rule. I may at this stage refer some of the authorities supporting my view. In the case of T. KRISHNASWAMI RAO AND OTHERS Vs. DUNDAPPA AND OTHERS, AIR 1962 MYSORE 17, it is held that the observations of a judge at the time of inspection can be used only for the purpose of better following and understanding the evidence adduced in the case or to test its accuracy. But the purpose of such inspection is not to substitute the impression formed as evidence in the case or to contradict the evidence placed before Court and make it the foundation of the judgment. In another case of GURU MAHATO AND ANOTHER Vs. JOGENDRA NATH AND ANOTHER, AIR 1935 PATNA 457, the Patna High Court, while dealing with the question about the practice, laid down that the Judge should undertake the local inspection for the purpose of understanding the evidence in the case but not for substituting his own views of the matter for the evidence in the case. The Apex Court while dealing with the question in the case of Ugam Singh & Anr. Vs Kesrimal & Others AIR 1971 SC 2540 has laid down that the judgment should not be based solely on the basis of personal local inspection. In short, the law lays down that Whatever has been concluded on the basis of local

inspection and brushing aside the evidence on record cannot be allowed to stand. From what in short is stated hereinabove from the judgment of the lower court in the case on hand, it can be said that the lower court has substituted its views & impression formed at the time of local inspection rather than using the same for better appreciation of the evidence. The impression formed is also used to contradict the evidence. Further the lower court also did not make a memorandum of the relevant facts observed, and proceeded to decide the suit overlooking the evidence which is contrary to law. When that is so the judgment & decree solely based on, it cannot be maintained.

18. The learned Judge has not found it necessary to deal with the Issues Nos. 3,4 and 5 and give findings thereon. As the evidence is available on record, there is no necessity to remand the matter for having the finding on those issues. Alternatively, it is also the contention of the respondents that they have taken the suit room on lease directly from the trust. It is pertinent to note that on oath, the respondent no.1 has stated that he is not at all the tenant of the suit room. Consistently, his case is that he constructed the suit room after hiring the land from the trust, and therefore, he is the owner of the superstructure and never hired that superstructure. In view of his such evidence and for want of any evidence on the point, the case advanced alternatively must fail.

19. After the appellant gave the notice on 30th May, 1972 revoking the licence and calling upon the respondents to hand over the possession of the suit room, the appellant filed P.S.R.P. No.19 of 1972 before Small Cause Court at Ahmedabad under Sec.41 of Presidency Small Causes Courts Act, because in reply to the said notice, the respondents had challenged the case of licence advanced, and were asserting tenancy, though later on in this case, they have disowned the stand of tenancy submitting the case of ownership. In that P.S.R.P. matter, the Small Cause Court, hearing parties on 6th August, 1975 passed the order and rejected the application holding that the respondents were not the licensees of the suit room. In view of this fact, the respondent took up the plea that the suit was hit by the principle of res-judicata and so the issue thereof is framed at Serial No.4.

20. The principle of res judicata would apply, provided the issue is directly and substantially in issue in a former suit between the same parties litigating

under the same title in a competent court to try such subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by such court. One of the requirements of Sec.11 is that former decision must be the decision in the suit and not in any other collateral or analogous proceedings. No doubt, question about licence was directly and substantially in issue in that P.S.R.P. matter before the Small Cause Court, but looking to the provision of Sec.41 of the Presidency Small Causes Act, what appears is that the said provision enables the parties to remedy their grievances by way of similar procedure, not amounting to suit, and the Small Cause Court plunges deep into question of title, tenancy or licence for just adjudication, but, that provision does not prevent the parties from obtaining relief initiating necessary suit in ordinary court of law, because that remedy is not at all taken away or barred, and hence even if the Small Cause Court gives findings under Sec.41, it would not be the finding in the suit, but the finding in collateral/analogous summary proceeding not amounting to suit within the meaning of Sec.11 C.P.Code. One of the essences of Sec.11 of Civil Procedure Code is, therefore, lacking in the case on hand. On this count, therefore, the principle of res judicata will not apply. It may be stated that this court had the occasion to deal with the identical question as back as in the year 1983 in the case of Girijashanker Prabhasker Raval vs Manharlal Jetashanker Dave, 1983 G.L.H. 865 wherein referring the relevant provision of Presidency Small Causes Court Act, 1882, it has been held that if the plaintiff files an application for recovery of possession under Sec.41 of the Presidency Small Causes Courts Act alleging that the defendant was licensee of the disputed premises and that his licence was terminated, was dismissed subsequently Regular Suit, if filed by the plaintiff in the City Civil Court alleging that defendant was the licensee, the said suit would not be barred by the principle of res-judicata, or on the principle analogous thereto. It is made further clear that Sec.41 of the Presidency Small Causes Courts Act, 1882 cannot be termed the suit, but simple application, and therefore, adjudication of the rights and obligations of the parties by a suit in a competent court is not at all prohibited, and therefore, the same would not operate as final decision so as to bring the principle of res-judicata to come into play. In view of the decision of this court, the plea of the respondents that the decision of the Presidency Small Causes Courts Act would operate as the res-judicata, cannot be accepted.

21. The respondents have in their written statement raised a plea about estoppel, and therefore, necessary issue at Serial No.5 has been framed. It is pertinent to note that no specific plea has been raised except by mere mentioning that the suit is barred by the principle of estoppel. The party raising the plea must be specific and if he has not specifically but vaguely raised the plea, the same cannot be countenanced. When in this case, a vague plea has been raised and no specific case is asserted, the plea raised cannot be countenanced. However it may be stated that neither of the requirements of Sec.115 of the India Evidence Act is satisfied in the case. The foundation of the rule of estoppel is the equitable doctrine. The object of estoppel also based on good conscience to prevent fraud and secure justice between parties by promotion of honesty and good faith and by preventing them from approbating and reprobating at the same time. Hence the estoppel comes into play provided the requisite conditions namely (1) representation of an existing fact distinct from a mere promise defuturo made by one party to the other, (2) other party believing it, must have been induced to act on the faith of it, and (3) he must have so acted to his detriment. The onus to prove estoppel is on the party who sets up the plea, for estoppel is not a pure question of law but a mixed question of law & facts and that is made clear by the Apex Court in the case of BENNET COLEMAN AND CO. PVT.LTD vs PUNJA PRIYA DAS GUPTA, AIR 1970 SC 426. There is nothing on record going to show that the appellant, by his declaration or act or omission intentionally caused or permitted the respondents to believe about the particular things namely ownership or lease to be true and in reality act upon such belief. Even after the Small Cause Court rejected the application, the appellant filed the suit. Whenever occasion arose, the appellant asserted his ownership and the case of licence he has alleged. By his no act or omission, the appellant caused the respondents to believe their ownership or the case of tenancy alleged in defence. In other words, there is no iota of evidence on record satisfying the aforesaid 3 conditions for attracting the principle of estoppel. The principle of estoppel, therefore, does not come into play. It seems, the plea is taken for the sake of taking the same.

22. There is nothing on record indicating that the appellant in any way acquiesced to the case alleged in defence. On the contrary, the above discussed evidence shows that the appellant continuously persisted his case of licence denying case of ownership alleged by the respondents in defence.

23. After giving notice dt. 13th May 1972 and soon after receipt of the reply thereof, the appellant filed P.S.R.P. under Sec.41 of the Presidency Small Causes Courts Act, 1881 and on his being unsuccessful before the Small Causes Court, the appellant, at the earliest, filed the suit on 18th October, 1975. The suit is not barred by the period of limitation. The appellant therefore cannot be blamed on the ground of laches, whenever necessary at the right earnest, he has taken appropriate action. It may be stated that the respondents have not shown how principles of acquiescence and laches would come into play. They have simply caviled, and have tried to catch anything available like a drowning man.

24. In view of the foregoing discussions, it is clear that the respondents are neither the owners nor the tenants of the suit room, and therefore, what can logically be deduced is that they are the licensees. Their licence is revoked issuing notice dt. 30th May, 1972. The obligation of the licensee is to hand over vacant and peaceful possession to the licensor, soon after the licence is revoked. In this case, therefore, the respondents being licensees and their licence having been revoked, are under obligation to hand over vacant and peaceful possession of the suit room to the present appellant. The appellant is, therefore, entitled to the decree as prayed for. The appeal, therefore, requires to be allowed.

24. In the result, the appeal is allowed, with costs throughout. The judgment and decree passed by the learned Judge below are hereby set aside and the respondents are hereby ordered to hand over vacant and peaceful possession of the suit room to the appellant on or before 18th June, 1997, failing which it would be open to the appellant to get possession preferring the execution petition. For mesne profits, inquiry shall be made under O. 20 R. 12, Civil Procedure Code. The decision of the Small Causes Court in P.S.R.P. No.19/72 does not bar the suit. Rest of the relief is rejected. Decree accordingly be drawn.

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